

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000221-001 DT

07/28/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

ALAN C KUFFNER

v.

MARY-CHRISTA PHOBA KIMBUENDE (001) DAVID ROSCOE

AVONDALE MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR-2014-01168.

Defendant-Appellee Mary-Christa Phoba Kimbuende (Defendant) was charged in Avondale Municipal Court with driving under the influence. The State contends the trial court erred in granting her Motion To Suppress, which alleged the officer did not have reasonable suspicion to stop her vehicle. For the following reasons, this Court reverses and vacates the ruling of the trial court.

I. FACTUAL BACKGROUND.

On May 3, 2014, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); and failure to drive in one lane, A.R.S. § 28-729(1). Prior to trial, Defendant filed a Motion To Suppress alleging the officer did not have reasonable suspicion to stop her vehicle.

At the hearing on Defendant's motion, Officer Joshua Selby testified he was on duty on May 3, 2014, heading west on Indian School Road approaching Santa Fe Trail. (R.T. of Jan. 14, 2015, at 7-8, 17.) He saw a vehicle also heading west, and as it went through the intersection with Santa Fe Trail, it drifted left into the oncoming left-turn lane and then jerked back into the westbound lane. (*Id.* at 8-13, 16, 25.) He saw the driver's side tires cross over the double yellow line into the oncoming lane so that the tires were into the lane by about one tire's width. (*Id.* at 10-12, 17-18, 20-22, 25.) Officer Selby then stopped the vehicle. (*Id.* at 14, 18.) He identified Defendant as the driver of the vehicle. (*Id.* at 23-24.)

After hearing the testimony and the arguments of the attorneys, the trial court granted Defendant's Motion To Suppress:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000221-001 DT

07/28/2015

First, I want to commend the officer for getting an impaired driver off the road. I don't think there's any doubt that she was impaired. The, the problem that we're facing here is a legal one and, and it's not one that should cause you any remorse. I disagree with you counsel on—I think *Livingston*, of all the cases I read in both of the briefs, it seems to me that the facts of this case are compelled by *Livingston*. Now you keep saying, when you say that she, she moved or she traveled into the other lane of traffic, that's an overstatement by the officer's own testimony, the width of the tire moved onto that (inaudible) lane, and she jerked back. That's not uncommon with inexperienced drivers. (Inaudible). The Court finds that counsel for the defendant has sustained their position. It's ordered suppressing the evidence resulting from the stop.

(R.T. of Jan. 14, 2015, at 32.) On January 28, 2015, the State filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ERR AS A MATTER OF LAW IN FINDING THE OFFICER DID NOT HAVE REASONABLE SUSPICION TO STOP DEFENDANT'S VEHICLE.

The State contends the trial court erred in finding the officer did not have the legal authority to stop Defendant's vehicle. In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). For reasonable suspicion, the Arizona Supreme Court has said:

Police officers may briefly detain an individual who they have reasonable suspicion to believe is involved in a crime. In assessing the reasonableness of a *Terry* stop, we examine “(1) whether the facts warranted the intrusion on the individual's Fourth Amendment rights, and (2) whether the scope of the intrusion was reasonably related to the circumstances which justified the interference in the first place.”

... Reasonable suspicion requires “a particularized and objective basis for suspecting that a person is engaged in criminal activity.” Officers [may not] act on a mere hunch, but seemingly innocent behavior [may] form the basis for reasonable suspicion if an officer, based on training and experience, can “perceive and articulate meaning in given conduct[,] which would be wholly innocent to the untrained observer.” The totality of the circumstances, not each factor in isolation, determines whether reasonable suspicion exists. (Noting that *Terry* forbids a “divide-and-conquer analysis”).

State v. Boteo-Flores, 230 Ariz. 105, 280 P.3d 1239, ¶¶ 11–12 (2012) (citations omitted), *accord*, *State v. Lawson*, 144 Ariz. 547, 551, 698 P.2d 1266, 1270 (1985) (police officer has reasonable suspicion to detain person if there are articulable facts for officer to suspect person is involved in criminal activity or commission of a traffic offense). The officer need not expressly rule out the possibility of innocent explanations for the conduct. *State v. Evans*, 237 Ariz. 231, 349 P.3d 205, ¶ 11

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000221-001 DT

07/28/2015

(2015). The Arizona statutes provide that a peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence. A.R.S. § 28-1594; A.R.S. § 13-3883(B). The Arizona Court of Appeals has held a traffic violation provides sufficient grounds to stop a vehicle. *State v. Moran*, 232 Ariz. 528, 307 P.3d 95, ¶ 4 (Ct. App. 2013); *State v. Acosta*, 166 Ariz. 254, 257, 801 P.2d 489, 492 (Ct. App. 1990), quoting *United States v. Garcia*, 897 F.2d 1413, 1419 (7th Cir. 1990).

Arizona law provides as follows:

A. A person shall not drive a vehicle to the left side of the roadway under the following conditions:

....

2. When approaching within 100 feet of or traversing any intersection

A.R.S. § 28-726(A)(2).

A. On all roadways of sufficient width, a person shall drive a vehicle on the right half of the roadway

A.R.S. § 28-721(A). In the present case, Officer Selby testified Defendant's vehicle moved to the left so that her driver's side tires crossed into the oncoming left-turn lane. Defendant's conduct violated both A.R.S. § 28-726(A)(2) and A.R.S. § 28-721(A). Because Defendant violated the Arizona traffic laws, Officer Selby was legally justified in stopping her.

Defendant contends, pursuant to *State v. Livingston*, 206 Ariz. 145, 75 P.3d 1103 (Ct. App. 2003), she did not commit a violation of A.R.S. § 28-729(1), and thus the officer did not have the legal authority to stop her. For four reasons, this Court concludes that *Livingston* is not controlling.

First, in *Livingston*, the issue was whether the defendant had *in fact* violated a traffic law, and thus there was no discussion of the right of an officer to stop and detain a person when reasonably necessary to investigate a *suspected* violation of a traffic law under A.R.S. § 13-3883(B) and A.R.S. § 28-1594. As stated by the Arizona Supreme Court:

Moreover, when the police make an arrest based upon probable cause, it is not material that the person arrested may turn out to be innocent, and the arresting officer is not required to conduct a trial before determining whether or not to make the arrest.

Cullison v. City of Peoria, 120 Ariz. 165, 168, 584 P.2d 1156, 1159 (1978). Thus, the fact the trial court ultimately concluded that Defendant did not violate A.R.S. § 28-729(1) did not negate Officer Selby's statutory right to stop and detain Defendant to investigate a *suspected* violation of the traffic laws.

Second, in *Livingston*, the officer's primary intent in stopping vehicles was to find violations of drug offenses and was using an alleged traffic violation as the reason for the stop. In the present case, the officer's intent was to identify drivers who were driving under the influence.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000221-001 DT

07/28/2015

Third, in *Livingston*, the officer “characterized that stretch of highway as rural, curved, and dangerous,” and saw “Livingston’s right side tires had crossed the white shoulder line on one occasion.” *Livingston* at ¶¶ 4, 5. The court held the “nearly as practicable” language “demonstrate[d] an express legislative intent to avoid penalizing brief, momentary, and minor deviations outside the marked lines,” and thus “the trial court did not abuse its discretion when it found that Livingston committed no violation.” *Livingston* at ¶¶ 10, 12. In *Acosta*, the driver was on Interstate Highway 40 in northern Arizona, and the trial court found “the defendant had crossed the line dividing the lanes by a tire’s width as many as six times.” 166 Ariz. at 256, 801 P.2d at 491. The court stated “the defendant’s car crossed the dividing line numerous times, thus constituting the offense of unsafe lane usage,” and therefore “there was reasonable suspicion to stop the vehicle.” 166 Ariz. at 257, 801 P.2d at 492. In the present case, Officer Selby testified this was a straight, wide road, and that there were no other vehicles on that area of the road. This Court thus concludes the situation was similar to that in *Acosta* and different from that in *Livingston*.

Fourth, as noted above, Defendant’s conduct violated both A.R.S. § 28–726(A)(2) and A.R.S. § 28–721(A). In *Livingston*, the court held the “as nearly as practicable” language in A.R.S. § 28–729(1) “demonstrate[d] an express legislative intent to avoid penalizing brief, momentary, and minor deviations outside the marked lines.” *Livingston* at ¶ 10. In neither A.R.S. § 28–726(A)(2) nor A.R.S. § 28–721(A) did the Arizona Legislature include the “as nearly as practicable” language, and thus did not provide that a driver “as nearly as practicable” shall not drive into the lane for oncoming traffic. This Court thus holds the omission of the “as nearly as practicable” language in A.R.S. § 28–726(A)(2) and A.R.S. § 28–721(A) demonstrates an express legislative intent to penalize brief, momentary, and minor deviations outside the marked lines. Moreover, in the civil context, driving over the center line is negligence *per se*. *Zancanaro v. Hopper*, 79 Ariz. 207, 212, 286 P.2d 205, 209 (1955).

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court erred as a matter of law in concluding Officer Selby did not have the legal authority to stop Defendant’s vehicle.

IT IS THEREFORE ORDERED reversing and vacating the ruling of the trial court.

IT IS FURTHER ORDERED remanding this matter to the Avondale Municipal Court for that Court to deny Defendant’s Motion To Suppress and for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

072820151510•

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.